BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY D. CARTER Claimant	)	
VS.	)	Docket No. **1,060,069**
PRATT LOVE BOX CO., LLC Self-Insured Respondent	)	

ORDER

Self-insured respondent requests review of the September 21, 2012 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Kenton D. Wirth, of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript dated April 26, 2012, with exhibits, and all pleadings contained in the administrative file.[1]

ISSUES

Judge Barnes ruled that claimant sustained a compensable back injury at work on February 20, 2012 and the prevailing factor in claimant's current symptoms and need for medical treatment was the work accident. Judge Barnes ordered respondent to provide medical treatment with Dr. George Fluter and pay certain medical bills. Judge Barnes further ordered respondent to pay claimant temporary total disability benefits at the rate of $555 from February 20, 2012, and continuing until he is released to substantial and gainful employment.

Respondent requests review of Judge Barnes' preliminary hearing Order. Respondent asserts Judge Barnes erred in finding claimant suffered an accident or injury on February 20, 2012, that claimant sustained injury arising out of and in the course of his employment, and that claimant's accident was the prevailing cause of his injury.

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[1] The record does not include the Galichia Heart Hospital records dated February 20, 2012 that respondent's counsel mailed to Judge Barnes under cover letter dated April 30, 2012. Such records were neither offered and accepted into evidence by Judge Barnes nor stipulated into evidence by both parties.

Claimant asserts that Judge Barnes' preliminary hearing Order be affirmed.

The issues raised on review are:

1. Did claimant suffer an accident or injury on February 20, 2012;

2. Did claimant sustain injury arising out of and in the course of his employment;

3. Was the accident the prevailing factor in causing claimant's injury.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant testified he was injured at work the morning of February 20, 2012 when bending over in an awkward position, pulling a pin, unhooking a trailer and cranking landing gear. Claimant has low back pain, left leg numbness and muscle spasms down both legs.

Claimant testified respondent's shipping and transportation manager, Julie Rodriguez, saw that he was in pain on February 20, 2012, and asked him what was wrong. Claimant testified that he told Ms. Rodriguez he hurt his low back after unhooking a trailer. Claimant testified that he told Ms. Rodriguez he did not know specifically how he was hurt, but knew he was hurt after unhooking the trailer.

Ms. Rodriguez testified claimant told her he did not know if he had been hurt at work on February 20, 2012. She testified claimant never told her he was hurt lowering landing gear or pulling the fifth wheel pin. Ms. Rodriguez prepared an undated time line noting that claimant, on February 20, 2012, told her he "wasn't sure" if he did "something at work" to hurt his back.[2] Ms. Rodriguez prepared another undated document stating claimant told her he had back pain on February 20, 2012, but he did not know what happened to him and did not know if he was injured at work.[3] Ms. Rodriguez never believed claimant's injury was work-related because he could not recall a specific instance of when his pain started.

Claimant testified that Ms. Rodriguez was also present for a conversation he had around noon on February 20, 2012, with Bobbie Claphan, his immediate supervisor. Claimant testified that Ms. Claphan asked him what was wrong and he told her he was injured from unhooking his tractor from his trailer. Ms. Rodriguez denied being present for any such discussion between claimant and Ms. Claphan.

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[2] P.H. Trans., Resp. Ex. 2 at 2.

[3] *Id.*, Resp. Ex. 2 at 1.

Ms. Claphan testified she did not have a conversation with claimant concerning a back injury from lowering landing gear on his trailer on February 20, 2012, but she acknowledged being in the same room with claimant and Ms. Rodriguez when claimant complained about back pain.

Claimant went to Galichia Heart Hospital on February 20, 2012. He went to his primary care physician, Hai K. Truong, D.O., on February 21, 2012.

A February 22, 2012 lumbar MRI was interpreted by Dr. Akash Joshi as showing a small left foraminal disc protrusion at L4-5 with moderate left foraminal stenosis, facet arthropathy most noticeable at L3-4 through L5-S1, as well as a small synovial cyst arising from the left L3-4 facet joint, projecting into the posterior spinal soft tissues.

A February 23, 2012 addendum, prepared by Shirley Johnson of Dr. Truong's office, noted claimant "was having back pain at work, then went to Galichia ER. on 2/20/12."[4] Dr. Truong referred claimant to James D. Weimar, M.D., a neurological surgeon.

Dr. Weimar evaluated claimant on February 27, 2012. Claimant's wife filled out a patient history form noting claimant was hurt at work on February 21, 2012 from "Riding in the truck & the way the sit bounce & cranking the landing gear."[5] The form further states, "Always had back pain but would go away with walking however as of 2-21-12 got ~~back~~ BAD & Does not seem to be getting better."[6]

Dr. Weimar's February 27, 2012 letter to Dr. Truong stated claimant had "chronic back pain that [was] exacerbated recently dating back roughly one week ago. This occurred when he was unlocking his trailer from his rig."[7] Dr. Weimar reviewed the MRI films and concluded there was no significant disc herniation, but there was a mild bulge at L4-5. Dr. Weimar noted that claimant may have suffered a back muscle strain, without any frank disc herniation. Dr. Weimar stated that the facet cyst may have contributed some to claimant's back pain.

Ms. Rodriguez testified that the first time she learned claimant was alleging that he was hurt at work was during a phone conversation she had with him on March 5, 2012. The undated time line prepared by Ms. Rodriguez described such phone discussion:

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[4] *Id.*, Cl. Ex. 2 at 3.

[5] *Id.*, Resp. Ex. 1 at 16.

[6] *Id.*

[7] *Id.*, Cl. Ex. 3 at 2.

> Tim called stating his back injury should have been work comp. I asked him "Why didn't he say that the injury happened at work?" He said "He told me that he did. I do not recall him stating the injury occurred at work. " I asked "How does a cyst relate to a work related injury?" Tim said he had a bulging disk along with the cyst.[8]

Dr. Weimar's April 24, 2012 letter stated it was possible that claimant's February 20, 2012 work injury resulted in a muscle strain that was the prevailing factor in claimant's then-present need for medical treatment.

Claimant had a prior back strain when he was 18 years old. Claimant denied ongoing back pain thereafter and did not seek a doctor's care for back pain until the February 20, 2012 accidental injury. A Primary Care Associates health history form claimant completed on October 9, 2007 noted he had severe back pain. He reported a history of back pain that day to Dr. Jeffrey Davis. The form and the report do not state when claimant had such back pain. He saw Dr. Davis on October 9, 2007 for headaches and sinus pressure.

PRINCIPLES OF LAW

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[9]

K.S.A. 2011 Supp. 44-508 provides:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[8] *Id.*, Resp. Ex. 2 at 2.

[9] K.S.A. 2011 Supp. 44-501b(c).

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board member affirms Judge Barnes' preliminary hearing Order.

Claimant's story is consistent that he advised Ms. Rodriguez and Ms. Claphan that he was injured while performing work duties on February 20, 2012.

Claimant testified that Ms. Rodriguez was present for a conversation he had with Ms. Claphan about his asserted back injury. Ms. Rodriguez denied being present for any such discussion, but Ms. Claphan testified she and Ms. Rodriguez were in the same room when claimant was complaining to Ms. Rodriguez about back pain. The claimant testified he was speaking to Ms. Claphan, but Ms. Claphan testified claimant was talking to Ms. Rodriguez. Ms. Rodriguez testified she was never present for any such discussion when all three people were in a room together. The fact that Ms. Rodriguez and Ms. Claphan have different memories of what the claimant may have said on February 20, 2012 is

problematic and shows that their memories of what occurred on the date of injury by accident may not be accurate.

Ms. Rodriguez' written documentation noted claimant "didn't know" or "wasn't sure" if he had been hurt due to work activities. Such descriptive language sounds like claimant may have been hurt performing work or maybe was not so injured, but it does not rule out claimant having been hurt at work. Even if claimant was not certain on February 20 that he had been hurt while working, such doubt does not mean that claimant was not hurt while performing work that day.

Ms. Rodriguez' documentation of a March 5, 2012 discussion with claimant noted claimant's contention that he already told her that he had been hurt at work. Ms. Rodriguez wrote she did not remember claimant previously telling her that he had been hurt at work. Ms. Rodriguez not remembering claimant reporting an injury is not the equivalent of the claimant having not told her that he had been injured performing work duties or proof that he was not hurt while performing work duties.

Ms. Rodriguez testified she first learned that claimant was alleging a work-related injury by accident on March 5, 2012. Even assuming claimant waited until March 5 to tell Ms. Rodriguez he had been hurt while working, such delay would not bar the claim under the notice statute, K.S.A. 2011 Supp. 44-520.[10]

Judge Barnes had the opportunity to assess claimant's testimony, along with the testimony of Ms. Rodriguez and Ms. Claphan. Judge Barnes impliedly found that claimant was credible, while apparently discounting the testimony of respondent's witnesses. As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[11] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. The Board generally gives some deference to a judge's findings and conclusions concerning credibility where the judge personally observed the testimony and does so in this claim.

The medical records support an accident occurring at work. There is no testimony or medical records in evidence demonstrating an alternate cause of claimant's complaints. The February 23, 2012 addendum contained in Dr. Truong's records noted claimant "was having back pain at work." Dr. Weimar's February 27, 2012 report and the corresponding patient history form completed by claimant's wife indicate that claimant was injured at work from "unlocking his trailer from his rig" or "cranking the landing gear."

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[10] Notice is not an issue in this matter, but respondent is apparently arguing that claimant's failure to provide notice earlier has some bearing on whether he suffered personal injury by accident that arose out of and in the course of his employment.

[11] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

Dr. Weimar noted that claimant had chronic back pain that had been exacerbated by the accident. However, there is very little to show that claimant's low back and leg symptoms were due to a preexisting condition. The claimant denied having any ongoing back problems or seeing any doctors or having any diagnosis for back pain between having back pain at age 18 and the February 20, 2012 accident. The October 2007 records from Dr. Davis illustrate that claimant had severe back pain at some unknown time. It does not appear that claimant was having back pain when seen by Dr. Davis, as claimant was only complaining at that time of headaches and sinus pressure, not back pain.

Respondent argues claimant failed to prove that his alleged accident was the prevailing factor in causing his injury. Dr. Weimar opined that it was "possible" that claimant's work injury caused a muscle strain and was the prevailing factor in claimant's need for medical treatment. Whether a claimant proves that an accident was the prevailing factor in causing injury, need for medical treatment, resulting disability or impairment is based on "all relevant evidence submitted by the parties."[12] While this Board Member certainly thinks it is important for litigants to have medical evidence regarding whether an accident was the prevailing factor in causing injury, need for treatment, disability or impairment, the law does not require a medical opinion on this issue.

Dr. Weimar's equivocal prevailing factor opinion does not defeat compensability. The relevant evidence, which includes claimant's testimony, the medical records submitted into evidence, and the lack of prior treatment records, establishes that claimant proved the February 20, 2012 accident was the prevailing factor in his injury and need for medical treatment.

CONCLUSION

This Board member agrees with Judge Barnes that claimant suffered personal injury by accident on February 20, 2012, and that such accident was the prevailing factor in causing his injury and need for medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

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[12] K.S.A. 2011 Supp. 44-508(g).

[13] K.S.A. 2011 Supp. 44-534a.

[14] K.S.A. 2011 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member finds that the September 21, 2012 preliminary hearing Order entered by Judge Barnes is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

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HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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